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ORIGINAL

TRANSCRIPT OF PROCEEDINGS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF:

MUSIC MINISTRIES, INC.
and
COMMUNITY EDUCATION AND RELIGION
BROADCASTING, INC.

MM DOCKET NO. 94-87

For Construction Permit for a New
Noncommercial Educational FM Station
on Channel 204A in Loogootee, Indiana

DATE OF CONFERENCE: September 13, 1994

VOLUME: 1

PLACE OF CONFERENCE: Washington, D.C.

PAGES: 1-19

FREE STATE REPORTING, INC.
Court Reporting Depositions
D.C. Area (301) 261-1902
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FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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MUSIC MINISTRIES, INC.)
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COMMUNITY EDUCATION AND RELIGION)
 BROADCASTING, INC.)

For Construction Permit for a New)
 Noncommercial Educational FM Station)
 on Channel 204A in Loogootee, Indiana)
 -----)

MM DOCKET NO. 94-87

The above-entitled matter come on for pre-hearing
 conference pursuant to Notice before Judge Arthur I.
 Steinberg, Administrative Law Judge, at 2000 L Street, N.W.,
 Washington, D.C., in Courtroom No. 3, on Tuesday, September
 13, 1994 at 9:05 a.m.

APPEARANCES:

On behalf of Music Ministries, Inc.:

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On behalf of Community Education and Religion Broadcasting,
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On behalf of Chief, Mass Media Bureau:

ROBERT ZAUNER, ESQUIRE
 2025 M Street, N.W., Suite 7212
 Washington, D.C. 20554

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I N D E X

	Page No.
<u>Opening Statements By:</u> Judge Steinberg	3
<u>Closing Statements By:</u> Judge Steinberg	18
Conference: 9:05 a.m.	Conference: 9:35 a.m.

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P R O C E E D I N G S

1
2 JUDGE STEINBERG: We're on the record now. This is
3 a prehearing conference in MM Docket No. 94-87 involving the
4 mutually exclusive applications of Music Ministries, Inc. and
5 Community Education and Religion Broadcasting, Inc. for a
6 construction permit for a new non-commercial educational FM
7 station in Loogootee, Indiana. The case was designated for
8 hearing on August 2, 1994. By order released August 9, 1994
9 the Chief Administrative Law Judge assigned the case to me and
10 set today as the date of the prehearing conference and
11 December 6, 1994 as the date of the hearing.

12 On August 11, 1994 I released an Order Prior to
13 Prehearing Conference directing that certain discussions take
14 place prior to this conference in establishing procedural
15 dates and we'll get to those matters after I take the
16 appearances of counsel. First, for Music Ministries, Inc.?

17 MR. LIPP: Mark N. Lipp and Christopher A. Holt from
18 the law firm of Mullin, Rhyne, Emmons and Topel.

19 JUDGE STEINBERG: For Community Education and
20 Religion Broadcasting, Inc.?

21 MR. CRAWFORD: Henry Crawford of the law offices of
22 Henry E. Crawford.

23 JUDGE STEINBERG: And for the Chief, Mass Media
24 Bureau?

25 MR. ZAUNER: Robert A. Zauner.

1 JUDGE STEINBERG: Okay. Let's -- I was going to use
2 the -- my prehearing order sort of as an agenda and we'll go
3 sort of out of sequence because Mr. Zauner's involved in
4 another hearing and has, has only a limited time available.

5 The first thing I want to take up is whether the
6 parties have discussed issue 2(c) which is a Section 307(b)
7 issue. In my Order Prior to Prehearing Conference I noted
8 that issue 2(c) contemplates a comparison of the applicants
9 pursuant to Section 307(b) of the Act. However, both
10 applicants seek a construction permit for a new FM station in
11 the same community and the Hearing Designation Order contained
12 no rationale for the specification of this issue. Therefore,
13 I raise the possibility that the issue may have been included
14 in error and I asked the counsel to discuss this. Has any
15 discussion taken place about that?

16 MR. CRAWFORD: Your Honor, we -- the counsel for
17 Music Ministries and myself discussed the, the matter last
18 Thursday and after analyzing 307(b) to the best of our
19 knowledge we couldn't see any relevance for the designation of
20 that issue either.

21 JUDGE STEINBERG: Okay. I think -- Mr. Holt?

22 MR. HOLT: I think at that time we discussed the
23 prospect of stipulating that there is no 307(b) issue and felt
24 that the joint stipulation would, would be sufficient to
25 resolve the issue.

1 JUDGE STEINBERG: Okay. I'll tell you my -- my
2 preference would be we've got issue 2(c) and then we've got
3 issue 3 and issue 3 refers to if a decision can't be made on
4 the basis of 307(b), blah, blah, blah. My preference would be
5 to modify issues 2 and 3 and just get rid of the language we
6 don't need and keep the language we do. And I was going to
7 suggest a -- that perhaps a joint motion to modify the issue
8 could be filed by the applicants. The Bureau could comment or
9 the Bureau could join in, and I would suggest that you confer
10 with the Bureau before you file the joint motion.

11 What I'm concerned with is I haven't had that many
12 non-commercial educational cases. As a matter of fact, I can
13 only think of maybe one or two that I've ever had and all of
14 them settled. But --

15 MR. ZAUNER: Just for the parties' information, I'm
16 going to be unavailable from the 15th through the 22nd of this
17 back, be back on the 26th.

18 JUDGE STEINBERG: Okay. What I was thinking is I
19 don't know without -- I mean I didn't look up what is the
20 standard non-comparative -- I mean standard non-commercial
21 educational comparative issue and is it issue 3 -- I mean or
22 is it issue 2 and 3. You know, basically all three -- all
23 counsel should get together and decide how issue 2 should
24 read, how issue 3 should read and then, and then I'll modify
25 it accordingly.

1 Whether we can just take out issue 2(c) and whether
2 we can just take out the, the introductory language in issue
3 3, I don't know and then leave the rest of it alone. Perhaps
4 you can get another -- and another non-commercial educational
5 case with -- you know, that's got the straight comparative --
6 you know, standard non-comparative -- I mean non-commercial
7 comparative issue and just copy that. That would be -- you
8 know, that would be fine. And then the Bureau can either
9 comment or join in, whatever their preference is.

10 Let me set a date for that. When do you think you'd
11 be able to do that by because I think we want to get this
12 straightened out quickly? Today is the 13th. How about by
13 the 23rd? Is that enough time? That's ten days. And then
14 when are you going to be back, Mr. Zauner?

15 MR. ZAUNER: The 26th.

16 JUDGE STEINBERG: Okay. So then it should be
17 sitting on your desk if you don't want to join in. Maybe
18 somebody else could, could be the point person in the hearing
19 branch on that in your absence. So we'll set September 23,
20 '94 at the date for the filing of the Joint Motion to Modify
21 the Issues. Okay. Now -- I guess we can get to that later.

22 I have another that's on the, on the issues I want
23 to talk about, but as long as Mr. Zauner here -- is here let
24 me talk about joint engineering. Have you talked -- have
25 counsel talked about a joint engineering exhibit or

1 stipulation with respect to issue 2(a) which is essentially a
2 areas and populations issue?

3 MR. CRAWFORD: We have discussed, we have discussed
4 that, Your Honor, and this has come up at an opportunity where
5 my client has not yet had an opportunity to check with her
6 engineer on, on that. You know, obviously if there's -- you
7 know, if there's nothing to be there, we'll be, you know -- if
8 there is no preference we'll be happy to stipulate or forego
9 that but, you know, to be frank with you, we haven't had an
10 opportunity yet to be --

11 JUDGE STEINBERG: Okay. What -- again, we want the
12 Bureau in on these discussions. I think I have the authority
13 to order a joint engineering exhibit and I've got a case
14 citation in my office from a case that I had when I was Bureau
15 counsel. I inherited it from Steve Yelverton and then it was
16 -- had a Review Board oral argument which I did, and there's
17 some footnote in some case and I think I've got the authority
18 to order a joint engineering exhibit. I think, I think it
19 does not help the record to have two engineering exhibits that
20 say something different and I don't think there's any reason
21 for two engineering exhibits of this nature to say something
22 different, so if you can't agree on a joint engineering, on a
23 joint engineering exhibit or stipulation I'm prepared to
24 direct that it be done.

25 MR. ZAUNER: Your Honor, may I suggest that you

1 direct that it be done --

2 JUDGE STEINBERG: Okay.

3 MR. ZAUNER: -- and that a date be set for exchange
4 and --

5 JUDGE STEINBERG: I've got that.

6 MR. ZAUNER: -- and that if they reach a stipulation
7 that they could just exchange the stipulation --

8 JUDGE STEINBERG: Right. I've got that in the
9 Prehearing Order.

10 MR. ZAUNER: Okay.

11 JUDGE STEINBERG: I've got October 25, 1994 --

12 MR. ZAUNER: Okay.

13 JUDGE STEINBERG: -- preliminary exchange of joint
14 engineering exhibit or stipulation.

15 MR. ZAUNER: Okay. Great.

16 JUDGE STEINBERG: So, so okay. I'll direct that a
17 joint engineering exhibit be submitted or a stipulation and --
18 I mean if it's a matter of you can't decide who the engineer's
19 going to be, perhaps Music Ministries will name an engineer,
20 Community will name an engineer and those engineers will pick
21 a third engineer and let the third engineer do it, you know,
22 like they do in arbitration or whatever. If something comes
23 up and you absolutely can't agree let me know and we'll have
24 another conference, see if we can't straighten it out, but I'd
25 like to have a joint engineering exhibit if there's going to

1 be engineering evidence. Of course, if there's a stipulation
2 the counsel can stipulate to it if the Bureau agrees. I don't
3 need engineering with respect to a stipulation.

4 Now, I don't see anything here. I want to discuss
5 settlement, share time, discovery and I want to -- something
6 else. I don't really see anything more that I need Mr. Zauner
7 here for.

8 MR. ZAUNER: Thank you, Your Honor.

9 MR. STEINBERG: Anybody see any need for Mr. Zauner
10 to remain?

11 MR. CRAWFORD: I think we -- yeah.

12 MR. ZAUNER: You think you can all manage without
13 me? Is that --

14 JUDGE STEINBERG: Well --

15 MR. CRAWFORD: If we could go off the record, Your
16 Honor?

17 JUDGE STEINBERG: Okay. Let's go off the record.

18 (Off the record.)

19 JUDGE STEINBERG: Okay. We're back on the record
20 and Mr. Zauner's been excused and he's involved in another
21 hearing and he went back to that other hearing.

22 Okay. Let me get to, to settlement. We talked a
23 little bit off the record when Mr. Zauner was here about
24 settlement and why don't you address that, Mr. Crawford?

25 MR. CRAWFORD: Sure. We had a settlement conference

1 on last Thursday between Music Ministries and Community
2 Education and Religion Broadcasting. During that settlement
3 discussion we discussed various possibilities, the first one
4 being the ability to apply, that one of the applicants, either
5 Music Ministries or Community Education and Religion
6 Broadcasting, to apply for an unallocated educational
7 frequency on channel 210A in Loogootee, and that settlement
8 proposal is still being considered by the parties and
9 counsel's impression is that, is that that particular avenue
10 of settlement looks particularly opportune at this particular
11 -- at this point in time, and so that has been given
12 considerable discussion and, and consideration by the parties.

13 JUDGE STEINBERG: Okay. My understanding is and my
14 -- from my experience that's the way virtually all of these
15 cases settle, is that -- I think there are very few of these
16 that don't settle. The ones that don't settle usually wind up
17 with some kind of a shared time arrangement, and the ones that
18 do settle end up the way Mr. Crawford described where there's
19 another frequency found and both applicants can have, have
20 their stations. So I suggest that you continue to explore
21 that and, as I said when Mr. Zauner was here, bring the Bureau
22 in to that and I think they like to get the engineering
23 materials informally and they'll work with your engineers to
24 get everything in shape before I ever see it.

25 MR. CRAWFORD: Your Honor, in order to avoid

1 incurred further costs because this is an educational case and
2 these are non-profit organizations is there a -- what would be
3 involved in just getting a stay on the, the hearing?

4 JUDGE STEINBERG: It's not going to happen. I will
5 -- I've set procedural dates in the order of -- prior to
6 prehearing conference and I said that the December 6th hearing
7 date is a firm date and I meant that. If this case goes to
8 hearing it will go to hearing on December 6th.

9 I will tell you, however -- and I will suspend the
10 dates or I'll continue the dates only under limited -- under a
11 limited circumstance, and that is if I have a -- if the case
12 is settled and I have a Memorandum of Understanding that's
13 signed by representatives of both applicants that outlines the
14 settlement terms and, and then all you need to do is put the
15 settlement papers together, or I get a, or I get a signed,
16 sealed and filed Settlement Agreement. If you need more time
17 to put together the attachments to the Settlement Agreement
18 fine, but unless -- I'm not going to continue the dates if I
19 get a call from counsel saying the case is settled. That's
20 happened many times and I've made the mistake of cancelling
21 the dates and somehow the case gets unsettled and I don't want
22 to do that. I want something in writing, either some kind of
23 Memorandum of Understanding that's preferably signed by each
24 of the applicants or I will take counsel's signature if you
25 can't get the applicants or a Settlement Agreement.

1 Otherwise, we're going to go to hearing on December 6th.

2 I should also tell you that the other procedural
3 dates, the completion of discovery date, the exhibit exchange
4 date, etc., etc., I'm willing to work with you on those within
5 the December 6th date. In other words, if -- November 4th is
6 the date that I set for the completion of all discovery and
7 that -- that's being generous. You've got half of September
8 and all of October. But if you, if you want to concentrate
9 your efforts on settling the case and you say okay, we didn't
10 start discovery until late, let's move that back a couple of
11 weeks, fine. Exhibit exchange, if you want to change it from
12 November 15th to the 22nd, fine if you want to go on a
13 shortened scheduled like that, but we're going to go to
14 hearing on this -- you know, the December 6th date will not
15 get cancelled unless I get a Settlement Agreement or a
16 Memorandum of Understanding that's signed. So I would urge
17 you to basically accelerate your efforts if you want to save
18 money.

19 Now, did anybody talk about a -- let me just ask if
20 Mr. Holt or Mr. Lipp wants to add anything to what Mr.
21 Crawford said.

22 MR. HOLT: We concur with Mr. Crawford's explanation
23 of the meeting. We do think that there's a real possibility
24 for this alternative to, to be accepted by the parties and --

25 JUDGE STEINBERG: Okay.

1 MR. HOLT: -- we hope it will be.

2 JUDGE STEINBERG: Well, I would encourage that. And
3 if -- you know, anything I can do to, to facilitate that other
4 than cancelling the hearing date I'll do, so I think I've made
5 my, my views known on the December 6th date. From my
6 experience if I cancel that date nothing would get done. If I
7 leave the date there things, things will get done in a hurry
8 because you're facing that date. You know, it's fish or cut
9 bait time. Did anybody discuss the share time arrangement?

10 MR. CRAWFORD: Your Honor, we discussed it very,
11 very briefly and that's only because we devoted most of our
12 time to discussing the two frequency theory, but, but we
13 didn't discuss it in any detail.

14 JUDGE STEINBERG: Okay. Well, if -- you know, if
15 the, if the additional frequency thing falls through then I
16 would urge you to discuss a shared time arrangement, something
17 like, you know, maybe one gets Mondays, Wednesday, Friday, the
18 other Tuesday, Thursday, Saturday and you split alternate
19 Sundays or alternate Sundays because that's sort of the
20 traditional way of doing it, and then if you have to flip a
21 coin to see who gets Monday, Wednesday and Friday or Tuesday
22 -- or if want to do well, we'll get Monday, Wednesday and
23 Friday for the first two years and they'll get it -- six
24 months you get it. They have lots of creative ways to do
25 that. Now, has anything been done on discovery?

1 MR. CRAWFORD: Your Honor, we have discussed two,
2 two items of discovery. First of all, we discussed
3 depositions and I think we've got two dates set for that or
4 two, two concepts. One would be at the end of September,
5 September 30th and October 1. That's two days. And the other
6 one would be on October 21 and October 22, 1994. We're still
7 in the process of trying to make sure that those dates are
8 amenable to our clients' schedules, but we've got two dates
9 for depositions.

10 JUDGE STEINBERG: Okay.

11 MR. CRAWFORD: We also have a joint production of
12 documents which counsel for Music Ministries has been so kind
13 to have generated here. I just got it this morning. I'll
14 have to review it --

15 JUDGE STEINBERG: Okay.

16 MR. CRAWFORD: -- but I don't anticipate that this
17 should give us --

18 JUDGE STEINBERG: Okay. So that would be like a
19 joint document production request that would apply to both of
20 you and that if there's -- as I said in my order, if there's a
21 separate request that can be separately -- I don't -- not
22 filed, but served because under the new rule I don't get any
23 of these. It's just you serve them on each other and then you
24 object. I get it -- into it at a later date, although again
25 my experience has been that the new procedure takes longer

1 | than the old procedure took if there's a fight. If there's an
2 | argument about documents it takes longer to resolve than under
3 | the old procedure, but too bad. That's the way it works.

4 | Let me tell you my philosophy on discovery and that
5 | is keep me out of it if you can. If you have differences try
6 | to make a good faith attempt to resolve them between
7 | yourselves. Try to compromise. Only if you hit a brick wall
8 | and you can't compromise or you can't get something agreed
9 | upon then come to me and I'll, and I'll issue a ruling. In
10 | other words, work -- you know, work with each other, try to
11 | accommodate each other, try to compromise as much as possible.
12 | Only if you can't -- absolutely can't then come to me and get
13 | me involved.

14 | Same thing with rulings during the course of the
15 | deposition. Try to accommodate each other and only if you
16 | can't call me for a ruling. I mean I'm perfectly willing to
17 | issue the rulings, but I think you should rely on each other
18 | and not use me as a crutch because you don't -- you know, you
19 | don't know what I'm going to do, so you may as well try to get
20 | the best you can for yourself and if you have to compromise to
21 | do it, do it.

22 | I would -- frankly, I would suggest that maybe the
23 | deposition should be put off until late October to give you a
24 | chance to try to settle the proceeding, put all your
25 | concentration on getting the settlement and, as I said, I'm

1 willing to, to work with the completion of discovery date if
2 it would be mutually agreeable with the parties. Okay.
3 Anything else on discovery?

4 Now, the final thing that I have is -- you're
5 probably not going to like this because this is going to
6 require work, and that is I would like some kind of a brief,
7 and preferably a joint brief, on the non-commercial
8 educational comparative issue, what factual matters are
9 included in the issue and what factual matters are excluded.

10 Very, very few of these things every go to hearing.
11 Not a single one that I had has ever gone to hearing. And I
12 would like a brief, and if I can get a joint brief that would
13 be wonderful, as to what the factors are. I don't even know
14 what the factors are. And so I'd like to put you to work on
15 my behalf and it would be helpful. I don't need anything
16 fancy, just this factor and then cite a case and I'll go read
17 the case so that when I'm sitting in the hearing and people
18 object because something's not relevant I'll be able to say
19 ah, it's not in this case or it is in this case. In other
20 words, you know, this is sort of like -- almost like a joint
21 trial brief. I'm sure both of you know or should know what
22 factors you're going to rely on to try to persuade me that
23 you've got a superior comparative proposal and what the cases
24 are to support that. And I'd like to know as soon as I can so
25 I can better prepare for the hearing and if it can be done

1 jointly that's wonderful. If you want to -- I -- if you don't
2 want to do that jointly or if you want to have a joint part
3 and then a separate part, you know, we both agree that this is
4 relevant, but Music Ministries thinks this is and this isn't
5 and Community said this isn't, this is, you know, that will be
6 extremely helpful to me because then I can read the cases and
7 prepare and I don't have to shoot from the hip because I don't
8 like shooting from the hip. It's not my style.

9 Let me set a date for that too and why don't we, why
10 don't we set November -- the exhibit exchange date is November
11 15th, so why don't we set November 15th as the date for the
12 filing of, of a brief or briefs -- of a joint brief or briefs
13 -- I'll have to work out the language in an order -- with
14 respect to the, the non-commercial educational comparative
15 issue? I think that, you know, that should give you plenty of
16 time to basically formulate your cases and find case support
17 for your propositions. And, as I said, if you all agreed that
18 these are the factors, that these are included and these
19 excluded -- also you'll be able to go through discovery too by
20 then and know what your opponents' cases are and it will also
21 make it easier to write your conclusions since you've done --
22 already done the research and it will help me enormously.
23 Anybody have any problem with that? Mr. Holt?

24 MR. HOLT: No, no, Your Honor. Thank you.

25 JUDGE STEINBERG: Mr. Crawford?

1 MR. CRAWFORD: I have no problem with that at all.

2 JUDGE STEINBERG: Okay. That will give you another
3 incentive to settle because then you won't have to write this
4 horrible brief. That's just about -- that completes the
5 agenda that I had. Anything that you want to bring up, Mr.
6 Crawford? You have to say no.

7 MR. CRAWFORD: No. No, I don't.

8 JUDGE STEINBERG: Okay. Mr. Holt?

9 MR. HOLT: No, Your Honor.

10 JUDGE STEINBERG: Mr. Lipp?

11 MR. LIPP: No, Your Honor.

12 JUDGE STEINBERG: Okay. Then we'll be in recess
13 until, until December 6, 1994. I want to thank you for coming
14 and again urge you to, to settle the case. If you need
15 another conference or if you want to confer with me informally
16 just pick up the phone and call and I'll -- first I'll try to
17 talk you out of having another conference and if I can't then
18 we'll have another conference or if there's something you want
19 to touch base with me on just pick up the phone and call, not
20 separately, you know. Let's not get into ex parte problems
21 but, you know, now that I've got, I've got conference calling
22 capabilities and speaker phones and speed dialing. It's truly
23 wonderful and I can look at my, look at my telephone and see
24 what time it is too.

25 MR. CRAWFORD: A modern agency.

1 JUDGE STEINBERG: Yeah. I mean now it's almost the
2 21st century.

3 (Off the record.)

4 JUDGE STEINBERG: Thank you very much for coming. I
5 appreciate it. And also use, use the good offices of Mr.
6 Zauner. Take advantage of that too if you have questions
7 because they're very good about, about helping out in a
8 situation like this. Okay. There being nothing further,
9 we'll end the conference now. Thank you.

10 (Whereupon, the conference adjourned at 9:35 a.m.).
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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

IN RE APPLICATION LOGGOOTEE, INDIANA

Name

MM DOCKET NO. 94-87

Docket No.

WASHINGTON, D.C.

Place

SEPTEMBER 13, 1994

Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 19, inclusive, are the true, accurate and complete transcript prepared from the reporting by Barbara Lord in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

9/19/94

Date

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Cheryl Phipps, Transcriber
Free State Reporting, Inc.

9/20/94

Date

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9/19/94

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